No. 74-6293

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

PHILIP J. GOLDBERG, PETITIONER

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner claims error in the presentation of the case to the grand jury, in the trial court's rulings and instructions, and in the court's refusal to order the government to make certain disclosures.

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on fourteen counts of using the mails to defraud, in violation of 18 U.S.C. 1341. He was fined $1000 and sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals reversed his conviction on one count and affirmed his convictions on the remaining counts (Pet. App. A). The court denied rehearing (Pet. App. B).

1. Petitioner claims that his indictment was invalid because one hour was insufficient for proper grand jury deliberation, the government's evidence before the grand jury consisted primarily of a hearsay account by the chief investigating agent, petitioner's request to testify before the grand jury was refused, and the evidence before the grand jury was not recorded. The court of appeals correctly held that, under United States v. Costello, 350 U.S. 359, these facts did not invalidate the indictment (Pet. App. 7). See also Lawn v. United States, 355 U.S. 379; United States v. Calandra, 414 U.S. 338, 342-345.

2. The court of appeals correctly held (Pet. App. 7-8) that the trial court properly refused to order the government either to refrain from using, or to deliver to petitioner a copy of, the "jury book" -- the prosecutor's notes concerning the jury venire. See Hamer v. United States, 259 F. 2d 274, 280-281 (C.A. 9), rejecting the contention that use of a jury-book created an unequal situation in the selection of the jury." Id. at 278. That petitioner was indigent did not entitle him to the prosecutor's investigative work product.

3. There is no merit to petitioner's claim that he was entitled to an instruction concerning concerning evidence of his good character. He did not actually introduce any character witnesses. Rather, in cross-examining a government witness in an effort to impeach her, he merely asked about her personal opinion of petitioner's general character, rather than about his reputation in the community (Tr. B, 199).

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4. Petitioner contends that the trial court erroneously permitted the jury to consider evidence of uncharged misconduct as proof of his guilt (Pet. 25, n.). The fraudulent scheme with which petitioner was charged, however, involved the issuance of single premium annuity policies, falsely purporting to be prepaid, for use as collateral for borrowing money from banks and other lenders (see Pet. App. 1-2). The challenged evidence concerned the policies and the company that issued them and hence was relevant to the fraudulent scheme charged by the indictment.

5. There is no basis for petitioner's claim that the prosecutor failed to disclose the full details of its plea bargain agreement with a co-defendant who testified as a government witness. A written agreement provided that the witness would be permitted to plead guilty to one count of the pending indictment and that probation would be recommended; a copy of this agreement was given to petitioner and formed the basis for stringent cross-examination of the witness. As the court of appeals found (Pet. App. 10), the determination to dismiss the indictment altogether against the witness and permit him to plead to new misdemeanor charges was made after trial, and hence was not part of a bargain to be disclosed at trial.

6. Petitioner's contention that the prosecutor threatened to indict a potential defense witness if the latter testified was the subject of a hearing by the trial court out of the presence of the jury. As the court of appeals noted (Pet. App. 8), the hearing disclosed that no threat was made, but rather that the prosecutor suggested to petitioner's attorney that the witness be advised of his Fifth Amendment rights because he might be indicted. The witness was so advised, but the prosecutor pledged to the

court that no indictment would be brought against him, and the witness testified. Petitioner's related complaint that one of his attorneys was not permitted to testify to rebut statements made by another government witness on cross-examination involves a collateral matter and exclusion of the proffered testimony was therefore within the trial court's discretion.

7. There is no merit to petitioner's contention that nondisclosure of notes made by the prosecutor concerning interviews with a principle government witness violated 18 U.S.C. 3500 and the principle of Brady v. Maryland, 373 U.S. 83. The government provided petitioner with a copy of the 89 page typewritten statement made by the witness in a two-and-one-half hour recorded conversation. The prosecutor's handwritten notes, based on some 40 hours of conferences with the witness, included the prosecutor's impressions, points of trial strategy, and explanations by the witness of items of physical evidence concerning which he did not himself testify. The court of appeals thus correctly held (Pet. App. 8) that the notes did not comprise a "statement" within the meaning of the Jencks Act.[1/] And, since

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1/ AIthough the court of appeals stated that the notes "were not statements of the defendant within the meaning of § 3500(e)" (Pet. App. 8), it is clear from the court's preceding discussion that it meant that the notes did not constitute statements of the witness for Jencks Act purposes.

petitioner does not contend that the notes exculpated him in any way, his reliance upon Brady is misplaced.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.